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October Term 1976

IN THE

Supreme Court of the United States

No. 76-492

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,

Appellants,

vs.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF IN OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

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An examination of the arguments presented by the appellees in support of their motion for summary affirmance reveals that they have totally misconstrued the argument presented by the appellants in the Jurisdictional Statement.

Governor Exon and Secretary of State Beermann are not contending that the action should have been dismissed as a result of *their* immunity but rather that the action should have been dismissed in that it was in reality an ac-

tion against the sovereign State of Nebraska and therefore in contravention of the Eleventh Amendment to the Constitution of the United States.

It is the appellants' position that this contention must be evaluated through an analysis of a separate and distinct progression of precedence from that which has developed concerning the doctrine of official immunity. Therefore, in light of the nature of the argument made and precedence cited in support of the appellees' motion for summary affirmance the following precedential analysis is offered as a clarification of the appellants' position advanced in the Jurisdictional Statement.

In 1949 this Court in the case of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457, held that a suit may fail as being one against the sovereign even if it is claimed that the officers being sued acted unconstitutionally or beyond their statutory powers. This Court indicated that such would be the case in situations where:

> ". . . the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. . . ." (93 L. Ed. at 1636, Note 11.)

Additionally in 1963 this Court made reference to this "affirmative action analysis" in *Hawaii v. Gordon*, 373 U. S. 57, 10 L. Ed. 2d 191, 83 S. Ct. 1052, wherein it was stated:

> ". . . The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. . . ." (10 L. Ed. 2d at 192.)

In the *Hawaii* case the order sought would have required

affirmative action on the part of a governmental officer.

In 1973 this Court decided the case of *Employees v. Missouri Public Health Department*, 411 U. S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614. In this case employees of the Missouri Department of Public Health and Welfare sued the State of Missouri to recover overtime compensation due them under the Federal Fair Labor Standards Act plus an equal amount as liquidated damages and attorneys fees. This Court was faced with the question of whether or not the Congress of the United States had lifted Missouri's sovereign immunity by enacting the Fair Labor Standards Act. This Court concluded that there was nothing within that Act which would lead them to believe that Congress, by the enactment of that legislation, had relieved the State of Missouri of its sovereign immunity.

This Court in *Employees, supra*, was careful to point out however that such a holding did not result in the parties being without a remedy. This Court made reference to the fact that the Fair Labor Standards Act made provisions for the Secretary of Labor enjoining violations of the Act and obtaining restitution on behalf of the employees such actions by the United States against a state not being barred by the Constitution. *United States v. Mississippi*, 380 U. S. 128, 15 L. Ed. 2d 717, 85 S. Ct. 808 (1965).

This Court in 1974 took the opportunity to reassess the position taken in *Employees v. Missouri Public Health Department, supra*, and the earlier case of *Parden v. Terminal Railroad Co.*, 337 U. S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). *Edelman v. Jordan*, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347, concerned a suit involving a federal-state program to aid the aged, blind and disabled in which it was alleged that the state officials were administering the program in a manner inconsistent with the pertinent

federal regulations and with the Fourteenth Amendment. This Court held that a federal court's remedial power consistent with the Eleventh Amendment was necessarily limited to prospective injunctive relief. This Court further held that the state by participating in this joint program had not waived its sovereign immunity under the Eleventh Amendment. Specifically as to the question of waiver, this court held:

> ". . . In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v Wilson Distilling Co., 213 US 151, 171, 53 L Ed 742, 29 S Ct 458 (1909). . . ." (39 L. Ed. 2d at 678.)

In this case Justice Marshall argued in dissent that although the Social Security Act itself did not create a private cause of action, 42 U. S. C., § 1983, coupled with the enactment of the federal program and the issuance by the Department of Health, Education and Welfare of regulations, created a cause of action for the plaintiffs. With respect to this argument this Court held:

> ". . . It is, of course, true that Rosado v Wyman, 397 US 397, 25 L Ed 2d 442, 90 S Ct 1207 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. [footnote omitted]. But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, [citation omitted]. . ." (39 L. Ed. 2d at 679, 680.)

This Court most recently in the case of *Fitzpatrick v. Bitzer,* —— U.S. ——, 49 L. Ed. 2d 614, 96 S. Ct. ——, (1976), reviewed the decision handed down in *Edelman, supra,* and specifically stated:

> ". . . the plaintiffs in [Edelman] . . . could not avail themselves of the doctrine of waiver expounded in cases such as Parden v. Terminal R. Co. [citation omitted], and Employees v. Department of Public Health and Welfare, [citation omitted], because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join a State as defendant. . . ." (49 L. Ed. 2d at 618, 619.)

Fitzpatrick, supra, concerned the 1972 amendments to Title VII of the Civil Rights Act of 1964. Congress acting under Section 5 of the Fourteenth Amendment had authorized federal courts to award money damages in favor of private individuals against the state government which subjected a person to employment discrimination. The question before this Court there was whether or not the holding in *Edelman, supra,* foreclosed such an exercise of power by Congress.

This Court distinguished its previous holdings by indicating that none of those cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted the Congress under Section 5 of the Fourteenth Amendment.

This Court concluded that the Eleventh Amendment and the principle of state sovereign immunity which it embod-

ies is necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. This Court held that since Congress had *specifically* acted by authorizing suits against state government in cases of employment discrimination in the 1972 amendments to Title VII of the Civil Rights Act of 1964, that the relief sought could, under these limited circumstances, be granted.

It would appear then from the foregoing review that the resolution of the issues presented herein would initially be controlled by this Court's holding in *Fitzpatrick, supra,* rather than the holdings of this Court concerning official immunity.

It is the position of the appellants that a determination of the applicability of the bar to jurisdiction found in the Eleventh Amendment involves a two-fold analysis. First, a determination as to the existence of specific congressional authorization for such an action and second in the absence of such a finding, a determination as to whether or not the action is one against the named state officers as individuals or is in reality an action against the sovereign.

The complaint filed herein made no reference to any such authorization and alleged only general constitutional violations. The only substantive jurisdiction alleged was 42 U. S. C. § 1983 and § 1985. However, as this Court pointed out in *Monroe v. Pape,* 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), the Civil Rights Act was not intended to include states as parties defendant.

It is contended that no such specific congressional authorization enacted pursuant to Section 5 of the Fourteenth

Amendment can be established such as to satisfy the requirements of *Fitzpatrick, supra.*

Therefore, since Congress has not specifically authorized the relief sought, the protection of the Eleventh Amendment to the United States Constitution is available to the appellants in this action if in fact it is an action against the state and not an action against the Governor and Secretary of State as individuals.

Applying the standards set by this Court in *Larson v. Domestic and Foreign Commerce Corporation, supra,* and *Hawaii v. Gordon, supra,* it is clear that the relief sought required affirmative action on the part of the sovereign in that the complaint did not seek compensation for alleged wrongs, but rather the initiation by the Court of a procedure whereby Mr. McCarthy might achieve placement upon the Nebraska Presidential Election ballot.

This is not an action against these named individuals for deprivations of constitutional rights for which they as individuals were responsible. This was an action against the sovereign State of Nebraska as a result of the state's failure to provide a means whereby an independent candidate for the office of President of the United States might achieve placement upon the Nebraska General Election ballot. Therefore, it is concluded that this case presents a substantial federal question.

CONCLUSION

Therefore the appellants' motion for summary affirmance and for reasonable fees and costs should be denied

and this Court should note probable jurisdiction, accept the cause for plenary consideration and reverse the judgment of the United States District Court for the District of Nebraska.

Respectfully submitted,

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska
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